IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of: Jerry L. MIZELL et al.	§	Confirmation No. 8303
Serial No.: 10/025,543	§	Group Art Unit: 2419
Filed: December 18, 2001	§	Examiner: Jay P. Patel
For: Node, Network, and Method for Providing Quality of Service Adjustments on a Per-Application Basis	§	

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REASONS IN SUPPORT OF PRE-APPEAL BRIEF REQUEST FOR REVIEW

I. INTRODUCTION

The present paper is being filed under the Official Gazette Notice of July 12, 2005, and in response to the final Office action mailed November 7, 2008, in connection with the above-noted application. A Notice of Appeal with the proper fee is being filed concurrently with this paper. It is assumed that no additional fees are required, but if any additional fees are required, the Commissioner is hereby authorized to charge any fees, including those for any extensions of time, to Haynes and Boone, LLP's Deposit Account No. 08-1394.

II. REASONS

In the final Office action mailed November 7, 2008, claims 1-16 were rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 7,072,300 to Chow et al. ("Chow") in view of U.S. Patent No. 7,023,820 to Chaskar ("Chaskar"). Applicants respectfully traverse the Examiner's position and submit that the Examiner has committed at least one clear error in rejecting the claims. As a result, for the reasons set forth in detail below, the combination fails to render obvious the pending claims.

In *KSR Int'l. Co. v. Teleflex Inc.*, 127 S. Ct. 1727 (2007), the U.S. Supreme Court stated that:

> *a patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art. Although common sense directs one to look with care at a patent application that claims as innovation the combination of two known devices according to their established functions, it can be important to identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does. This is*

> *so because inventions in most, if not all, instances rely upon building blocks long since uncovered, and claimed discoveries almost of necessity will be combinations of what, in some sense, is already known.*

Id. at 1741 (emphasis added).

Additionally, as the PTO recognizes in MPEP § 2142:

> *The examiner bears the initial burden of factually supporting any prima facie conclusion of obviousness. If the examiner does not produce a prima facie case, the applicant is under no obligation to submit evidence of nonobviousness.*

MPEP § 2143.03 states that "[a]ll words in a claim must be considered in judging the patentability of that claim against the prior art." In the present case, the Examiner has not shown that all words in the claims have been considered.

In particular, with regard to claim 1, Chow clearly fails to teach or suggest "filtering a packet of data to determine an application associated therewith for processing the packet . . . . " (emphasis added). In this regard, the Examiner cites column 7, lines 6-8, of Chow as teaching "filtering a packet of data for an application associated therewith;" however, the cited text merely discloses determining policy information associated with the received data frames. Such "policy information" disclosed by Chow is clearly not equivalent to "an application . . . for processing the packet" as recited in claim 1. Examples of such applications for processing packets within the context of the claim language are identified *inter alia* at paragraph 0027 of the present specification and include wireless email, Internet browsing, and streaming media. Clearly, whatever else it may be, "policy information" is not equivalent to any of the identified examples or any other application for processing packets as required by claim 1.

In the Response to Arguments section of the final Office action, the Examiner posits that because the policy equation identified by the port filter's policy rules "specifies the type of processing to be given to the received frame . . . clearly Chow reads on filtering an application associated therewith for processing the packet. However, the type of processing that may be given to a packet according to Chow is described as "whether the data frame should receive expedited, assured, or default processing or whether the data frame should be dropped or sent to a management device." Clearly, this is not equivalent to determining an application for processing the packet.

Chaskar, which is cited for its teaching of applying differential services in a mobile telecommunications network, fails to remedy the deficiencies of Chow discussed above.

Thus, for the foregoing reasons, the Examiner's burden of supporting a prima facie case of obviousness clearly has not been met, and the rejection of claim 1 under 35 U.S.C. §103 should be withdrawn. Independent claims 6 and 12 include limitations similar to those of claim 1 discussed above

and are therefore also not rendered obvious by the cited combination. Claims 2-5, 7-11, and 13-16 depend from and further limit claims 1, 6, and 12 and are therefore also deemed to be allowable over the cited combination for at least that reason.

III. CONCLUSION

In view of the fact that there is at least one clear error in the Examiner's position, as demonstrated above, it is apparent that the rejection of the pending claims under 35 U.S.C. §103 is not supported by the combination of references and should therefore be withdrawn. Accordingly, all of the pending the claims in the application being in condition for allowance, such action is respectfully requested.

Respectfully submitted,

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